

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THEODORA SHELTON,

Plaintiff and Appellant,

v.

MARION NIKLIBORC et al.,

Defendants and Respondents.

E038909

(Super.Ct.No. RIC393647)

OPINION

APPEAL from the Superior Court of Riverside County. Stephen D. Cunnison, Judge. Affirmed.

Sabbah & Mackoul and Connie L. Younger for Plaintiff and Appellant.

Fiore, Racobs & Powers, Peter E. Racobs and Amanda N. Owen, for Defendants and Respondents.

Plaintiff and appellant Theodora Sheldon (plaintiff) appeals a trial court's order awarding defendants and respondents De Anza Estates Homeowners Association, Inc. (the association), Marion Nikliborc, Douglas Vierra, Michael Riggs, Genoveva

Rodriguez, Vickie Schlone, and Guardian Preferred Properties, Inc. (collectively, defendants) attorney fees under Civil Code section 1354, subdivision (c).<sup>1</sup> We affirm the order.

### FACTUAL AND PROCEDURAL BACKGROUND

On May 27, 2003, plaintiff, along with homeowner Jennie Ann Guida (collectively, plaintiffs), filed a complaint against defendants alleging causes of action for intentional misrepresentation, fraud and deceit, a violation of Business and Professions Code section 17200 et seq., fraudulent conversion, declaratory relief, and injunctive relief (the complaint). Essentially, plaintiffs alleged that defendants improperly appointed themselves to be the board of directors of the association, rather than holding an election. The complaint further alleged that defendants subsequently misrepresented themselves as the board of directors, and that they did not have the legal authority to manage the association, to increase and collect association fees, or to initiate foreclosure proceedings. Plaintiffs alleged that these actions were in violation of what was permissible under the governing documents of the association (the governing documents), and requested that the court stop defendants from abusing their “self-appointed powers.”

Initially, defense counsel communicated with plaintiffs and attempted to get plaintiffs to dismiss the complaint, or at least to dismiss the individual defendants and narrow the issues. Since defendants did not file an answer, plaintiffs filed a request for

---

<sup>1</sup> All further statutory references will be to the Civil Code, unless otherwise noted.

entry of default. Defendants moved for, and were granted, a motion for relief from default.

On December 6, 2004, defendants filed a motion to compel further responses to special interrogatories from plaintiff, which was granted. On March 2, 2005, defendants filed a motion to dismiss for failure to comply with discovery orders. That motion was denied.

The trial date was set for May 16, 2005. On April 25, 2005, Ms. Guida filed a request for dismissal of the complaint with prejudice. Three days later, plaintiff filed a request for dismissal without prejudice of the entire action, and the complaint was dismissed that day.

On May 24, 2005, defendants filed a motion for attorney fees under section 1354, subdivision (c). A hearing on the motion was held on July 5, 2005. Plaintiff contended that she only filed a dismissal because her discovery demands went unanswered and because she was unable, due to illness, to attend her deposition the day before the discovery cutoff. The court concluded that such explanation ignored defendants' demands, over the course of nearly a year, that the case be dismissed. The court also found defendants to be the prevailing parties. Defense counsel declined to disclose its billing records, so the court made "its best estimate of the overall value of the services of [defense] counsel" and awarded defendants \$30,000 in attorney fees.

## ANALYSIS

### The Trial Court Properly Awarded Defendants Attorney Fees Under Section 1354

#### A. Attorney Fees Under Section 1354 Were Applicable

Plaintiff first contends that attorney fees were not available to defendants under section 1354. She argues that, at the time she filed the complaint, section 1354 differentiated between two types of actions—one under section 1354, subdivision (a), and one under subdivision (b)—and that section 1354, subdivision (f), only allowed attorney fees in a subdivision (a) type action. She asserts that since her complaint was a subdivision (b) type action, defendants could not be awarded attorney fees. Plaintiff’s argument is meritless.

#### 1. Standard of Review

The determination of whether the criteria for an award of attorney fees under section 1354 were met is a question of law requiring a de novo standard of review. (*Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169; *Salawy v. Ocean Towers Housing Corp.* (2004) 121 Cal.App.4th 664, 669 (*Salawy*).)

#### 2. Section 1354 Attorney Fees Were Applicable Here

“Section 1354 is part of the Davis-Stirling Act, which governs common interest developments in California. (§ 1350 et seq.)” (*Salawy, supra*, 121 Cal.App.4th at p. 669.) At the time plaintiff filed the complaint in 2003, section 1354, subdivision (a) stated (and still states) that the covenants and restrictions set forth in an association’s governing documents are binding upon and enforceable by the association and all owners of separate interests. (§ 1354, subd. (a).) Subdivision (b) contained the requirement that

actions to enforce the governing documents, but solely for declaratory or injunctive relief, or for declaratory or injunctive relief in conjunction with a claim for damages under \$5,000, had to be submitted to alternative dispute resolution (ADR) prior to filing a lawsuit. As to attorney fees, section 1354, subdivision (f), provided: “In any action specified in subdivision (a) to enforce the governing documents, the prevailing party shall be awarded reasonable attorney’s fees and costs.” We note that “governing documents” are defined as “the declaration and any other documents, such as by-laws, operating rules of the association, articles of incorporation, or articles of association, which govern the operation of the common interest development or association.” (§ 1351, subd. (j).)

In 2004, section 1354 was rewritten. The provision for attorney fees is now contained in subdivision (c), which simply provides that “[i]n an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney’s fees and costs.” (See *Arias v. Katella Townhouse Homeowners Assn., Inc.* (2005) 127 Cal.App.4th 847, 853, fn. 1 (*Arias*).) The first sentence of former subdivision (f) was continued without substantive change in subdivision (c). (*Ibid.*) In addition, subdivisions (b) through (e), regarding the ADR requirement, were relocated and revised as section 1369.510 et seq. (Cal. Law Revision Com. com., 8 West’s Ann. Civ. Code (2006 supp.) foll. § 1354, p. 101.)

In the instant case, defendants relied on section 1354, subdivision (c), for its recovery of attorney fees, rather than subdivision (f), since the complaint was dismissed after section 1354 had been amended. Whether attorney fees are allowed to a litigant usually “depends on the terms of the statute which is in force at the time the judgment is

rendered, not on law which existed when the suit was commenced.” (*Mir v. Charter Suburban Hospital* (1994) 27 Cal.App.4th 1471, 1478.) There was no actual judgment rendered in the instant case, but plaintiff dismissed the complaint in 2005. Attorney fees under section 1354, subdivision (c), were applicable here since plaintiff’s complaint was an action brought to enforce the governing documents. Essentially, all of plaintiff’s causes of action asserted that defendants violated the governing documents by appointing themselves as the board of directors of the association and managing the association without the legal authority to do so. Thus, the trial court properly applied section 1354 here in awarding defendant’s attorney fees. (See also, § B *post.*)

Accordingly, we reject plaintiff’s argument that attorney fees were not available in this case for the following reasons. First, section 1354, subdivision (c), was in effect at the time she dismissed the complaint. (See *ante.*) Second, plaintiff fails to cite any authority for her proposition, and “[w]here a point is merely asserted by appellant’s counsel without any . . . authority for the proposition, it is deemed to be without foundation and requires no discussion by the reviewing court. [Citation.]” (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 (*Atchley*).) Third, contrary to plaintiff’s assertion, the complaint did not *solely* seek declaratory and injunctive relief under section 1354, subdivision (b). The complaint alleged causes of action for intentional misrepresentation, fraud, violations of Business and Professions Code section 17200 et seq., and fraudulent conversion, and sought general and special damages “in an amount to be determined according to proof at trial,” as well as punitive damages. Thus, under her

own theory, plaintiff's complaint was a subdivision (a) type action, and section 1354 attorney fees were applicable here.

B. The Court Properly Determined That Defendants Were the Prevailing Parties

Plaintiff argues that the trial court abused its discretion in determining that defendants were the prevailing parties under section 1354. She claims that there is no case law that has determined that a homeowner should pay attorney fees to a defendant homeowners association after voluntarily dismissing his or her case without prejudice. In other words, she contends that there is no prevailing party when the plaintiff dismisses the case. We disagree.

1. Standard of Review

The trial court should determine who the prevailing party is under section 1354 by analyzing which party succeeded "on a practical level." (*Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1574 (*Heather Farms*)). Under this approach, "the court determines the prevailing party by analyzing which party realized its litigation objectives." (*Castro v. Superior Court* (2004) 116 Cal.App.4th 1010, 1019 (*Castro*)). This ruling should be affirmed on appeal absent an abuse of discretion. (*Ibid.*)

2. The Court Did Not Abuse its Discretion

In *Parrott v. Mooring Townhomes Assn., Inc.* (2003) 112 Cal.App.4th 873 (*Parrott*), two homeowners filed suit against a homeowners' association for injunctive and declaratory relief to invalidate a vote approving a special assessment. (*Id.* at p. 875.) The homeowners voluntarily dismissed their complaint without prejudice. (*Ibid.*) The homeowners' association then moved to be determined the prevailing party and for

recovery of attorney fees incurred in defending the action, pursuant to section 1354, subdivision (f). The trial court found the association to be the prevailing party and awarded it \$ 9,000 in fees. (*Parrott, supra*, 112 Cal.App.4th at p. 875.) The Court of Appeal upheld the trial court's finding that the association was the prevailing party, even though the plaintiffs had voluntarily dismissed the complaint without prejudice. (*Id.* at p. 877.)

The facts of the underlying litigation in the instant case are nearly identical to those in *Parrott*. The actual issue in *Parrott* was whether or not the trial court had jurisdiction to determine who was a prevailing party under section 1354, subdivision (f), for purposes of awarding attorney fees after the plaintiffs' voluntary dismissal. (*Parrott, supra*, 112 Cal.App.4th at pp. 876-877.) Nonetheless, of significance to the instant case, the appellate court affirmed that the defendant homeowners association was the prevailing party under section 1354, even though the plaintiff homeowners voluntarily dismissed the case. (*Id.* at pp. 879-880.) Thus, contrary to plaintiff's contention, the court here could award attorney fees to defendants under section 1354, even though plaintiff voluntarily dismissed the complaint.

Furthermore, the trial court in the instant case properly determined that defendants were the prevailing parties. The court specifically found that defendants prevailed on a practical level, after defendants demanded, over the course of nearly a year, that plaintiff dismiss the case. The record clearly shows that defendants' goal was to get the case dismissed, as evidenced by their repeated requests for plaintiff to do so. The court considered plaintiff's explanation that she dismissed the case because her discovery

demands went unanswered, and because she was unable to attend her deposition because of illness, but felt that such reasons overlooked defendants' demands for dismissal. We note that there is no indication in the record that defendants failed to respond to plaintiff's discovery demands. In fact, the record reflects that *plaintiff* failed to adequately respond to *defendants'* discovery requests, as evidenced by the court granting defendants' motion to compel responses from plaintiff. On appeal, plaintiff further contends that the dismissal was the result of defendants' refusal to arbitrate, after multiple requests on her part. However, plaintiff fails to cite to the record to support this contention. In any case, we cannot say that the court abused its discretion in determining that defendants' prevailed on a practical level, since defendants ultimately reached their litigation objective. (*Castro, supra*, 116 Cal.App.4th 1010, 1019.)

Plaintiff attempts to distinguish *Parrott* by stating that, although it involved an action for declaratory and injunctive relief, as in the instant case, that action "related to or rather was 'in conjunction with . . . association assessments' which is an exception to the 1354(b) types of action that does [*sic*] not permit attorney fees." Plaintiff merely asserts this point without any further argument or authority. (*Atchley, supra*, 151 Cal.App.3d at p. 647.) She ultimately fails to make any meaningful distinction between *Parrott* and the instant case.

Plaintiff further asserts that "a Defendant homeowner can never be awarded attorney fees in a common interest development enforcement case." She then cites the portion of *Gil v. Mansano* (2004) 121 Cal.App.4th 739 (*Gil*) which states: "Narrow statutory language limited to 'actions to enforce' does not authorize attorney fee awards

where the statute is used defensively. (Civ. Code, § 1354, subd. (f).) [Citation.]” (*Id.* at p. 745.) Plaintiff’s argument is undeveloped and consequently unintelligible. She alludes to the fact that section 1354 applies “only to homeowners and homeowners associations as parties and no others” and then asserts that the court here awarded attorney fees to all seven defendants, five of whom were individuals. Assuming that plaintiff is contending that the court could not award attorney fees to individual defendants under section 1354, we find this contention to be disingenuous. The complaint named the individual defendants in their capacities as agents of the association, not as mere individuals. Moreover, the record clearly demonstrates that defense counsel repeatedly requested that plaintiff dismiss the individual defendants and proceed against the association only, but plaintiff evidently refused to do so. In any case, *Gil* does not support plaintiff’s contention.

We conclude that the trial court did not abuse its discretion in determining that defendants were the prevailing parties.

#### C. Defendants Were Not Required to Participate in ADR

Plaintiff next argues that the court abused its discretion in awarding defendants attorney fees because defendants failed to participate in ADR before commencement of the action, as required by sections 1363.820 and 1363.840. However, section 1363.810 et seq. applies to internal disputes between an association and its members and requires the association to provide a simple intra-association dispute resolution procedure.

(§ 1363.810.) This requirement is distinct from the ADR process involving a neutral party required by section 1369.510 et seq. as a prerequisite to litigation to resolve a

dispute. (Cal. Law Revision Com. com., 8 West’s Ann. Civ. Code (2006 supp.) foll. § 1363.810, p. 145.) Thus, plaintiff’s argument is misplaced.

D. The Award Was Reasonable

Plaintiff argues that the court’s award of \$30,000 in attorney fees was unreasonable for various reasons. We disagree.

1. Standard of Review

“The determination of what constitutes the actual and reasonable attorney fees is committed to the sound discretion of the trial court. An appellate court will interfere with that determination only where there has been a manifest abuse of discretion.” (*Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, 228 (*Fed-Mart Corp.*).)

2. There Was No Abuse of Discretion

Here, defense counsel stated that the actual amount billed to defendants was \$45,469.25, excluding the expense for preparing the motion for attorney fees. Defense counsel requested a total award of \$71,267.25 in attorney fees. Although defense counsel did not submit billing statements, since they reflected both work product and attorney-client communications, defense counsel did submit a declaration testifying to the number of hours worked and the billing rate charged. We note that “[a]n attorney’s testimony as to the number of hours worked is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records. [Citation.]” (*Steiny & Co. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285, 293.) Furthermore, “[a]n award for attorney fees may be made in some instances solely on the basis of the experience and

knowledge of the trial judge without the need to consider any evidence. [Citations.]”  
(*Fed-Mart Corp.*, *supra*, 111 Cal.App.3d at p. 227.)

The court here considered such factors as the time spent in litigating the case, the difficulty of the issues involved, and the degree of skill, experience, and learning required in defending the case. The court did not feel that the issues were particularly difficult, or that any special skills or experience were required. In the absence of billing records, the court made its best estimate of the overall value of the services of counsel and awarded defendants \$30,000, which included the time and expense spent on the motion for attorney fees. Thus, the court awarded approximately \$15,000 *less* than the amount incurred by defendants and *less than half* of the total amount requested. There was no manifest abuse of discretion in the court’s award.

Plaintiff argues that the attorney fees award was unreasonable because: 1) the court failed to consider that Ms. Guida dismissed her case just days before the date set for trial; 2) section 1354 only allowed attorney fees to one out of seven defendants and only allowed attorney fees on certain causes of action; and 3) defense counsel supported his motion for attorney fees by citing an unpublished opinion, in violation of California Rules of Court, rule 977(a). Defendants’ attorney fees were all incurred in the proceedings regardless of the number of plaintiffs and defendants; furthermore, we note that all the defendants were represented by the same counsel. As to plaintiff’s other issues, she has waived them since she failed to raise them below. (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117.)

E. Defendants May Recover Attorney Fees On Appeal

In addition, defendants correctly contend that if they prevail on this appeal they are entitled to recover their appellate attorney fees. “A statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise. [Citations.]” (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499.) Section 1354 does not preclude recovery of appellate attorney fees by a prevailing defendant; hence they are recoverable.

DISPOSITION

The order is affirmed. Defendants shall recover their costs and attorney fees on appeal, the amount of which shall be determined by the trial court.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ Hollenhorst  
Acting P.J.

We concur:

/s/ Richli  
J.

/s/ King  
J.